

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH DOWELL,

Petitioner,

v.

BOARD OF PAROLE HEARINGS,

Respondent.

No. 08-01683 CW

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS
AND GRANTING
CERTIFICATE OF
APPEALABILITY

Petitioner Kenneth Dowell, an inmate at San Quentin State Prison, filed a petition for a writ of habeas corpus pursuant to title 28 U.S.C. § 2254, challenging as a violation of his constitutional rights the denial of parole by Respondent California Board of Parole Hearings¹ (Board) on November 30, 2006. Respondent opposes the petition. Petitioner has not filed a traverse.

After the matter was submitted, on April 22, 2010, the Ninth Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc), which addressed federal habeas review of the Board's decisions denying parole to California state prisoners. The Court ordered the parties to file supplemental briefing addressing Hayward, and both parties did so.

Having considered all of the papers filed by the parties, the

¹ Petitioner incorrectly sues the Board of Prison Hearings.

1 Court denies the petition.

2 BACKGROUND

3 I. The Commitment Offense

4 The following summary of the facts of Petitioner's commitment
5 offense is derived from the superior court's opinion on habeas
6 review.

7 At the time of the commitment offense, Petitioner was
8 separated from his common law wife (ex-wife). The ex-
9 wife was dating another man (boyfriend), who she planned
10 to marry. Petitioner was jealous and angry with the
11 boyfriend, because Petitioner thought that the boyfriend
12 was coming between Petitioner and his ex-wife and
13 children. On March 24, 1982, Petitioner entered the
14 residence of his ex-wife. Petitioner stated that he was
15 going to kill his ex-wife and her boyfriend. Petitioner
16 forced his ex-wife into his vehicle. The two drove
17 around searching for the boyfriend. The boyfriend
18 happened to be following Petitioner. Petitioner stopped
19 his vehicle and retrieved a handgun located beneath the
20 seat. Petitioner told the boyfriend that he was going to
21 kill him. Petitioner and the boyfriend fired shots.
22 When Petitioner's handgun no longer had any ammunition,
23 he retrieved a shotgun from his vehicle and continued to
24 shoot at the boyfriend. The boyfriend was shot several
25 times and died from the wounds. After Petitioner shot
26 the boyfriend, the ex-wife ran away from the scene.

27 Resp.'s Ex.2, In re Kenneth Dowell, No. BH004727 (Cal. Sup. Ct.
28 October 26, 2007) at 2.

On October 13, 1983, a jury found Petitioner guilty of second
degree murder with the use of a firearm, for which he was sentenced
to fifteen years to life plus two consecutive years for use of a
firearm. Resp.'s Ex. 1, attachment A, November 9, 1983 Probation
Officer Report.

II. November 30, 2006 Board Hearing

The Board found that Petitioner was unsuitable for parole and
would pose an unreasonable risk of danger to society or a threat to

1 public safety if released from prison. The Board found that the
2 commitment offense was carried out in an especially cruel and
3 callous manner because it involved multiple victims -- Petitioner's
4 ex-wife and her boyfriend, James Winnet -- and was done execution-
5 style because Mr. Winnet had his hands up and was surrendering when
6 Petitioner took his shotgun out of his car and shot him again. The
7 Board also found that Petitioner's motive was trivial in relation
8 to the offense because it was based on jealousy.

9 The Board found that Petitioner had an escalating pattern of
10 criminal conduct before the commitment offense based on his
11 convictions for public drunkenness in 1965, possession of narcotics
12 and possession of a concealed weapon in 1970, failure to pay child
13 support in 1974, driving under the influence of alcohol in 1977 and
14 pandering in 1980. The Board noted that Petitioner was on
15 probation for the pandering offense at the time of the commitment
16 offense. The Board also noted that Petitioner had a history of
17 unstable or tumultuous relationships with others, notably with his
18 ex-wife.

19 The Board emphasized that, although Petitioner attended
20 services of the church of the Latter Day Saints (LDS), he had not
21 attended any self-help programs since 1996. The Board also cited a
22 May 2, 2006 report authored by psychologist Dr. Michelle Inaba, who
23 concluded that Petitioner presented a low risk of violence in a
24 controlled environment and a low risk of violence if released into
25 the community, provided he abstained from the use of alcohol and
26 drugs. The Board was concerned that Dr. Inaba failed to estimate
27 Petitioner's ability to refrain from the use of alcohol when
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1 released and failed to address whether Petitioner had accepted
2 responsibility for the commitment offense, and was aware of its
3 underlying causes and of his need for future therapy and self-help
4 programs. The panel noted that Dr. Inaba only addressed these
5 questions by quoting Petitioner's statement that "he hasn't thought
6 about drinking for years," and concluded that this was an
7 inadequate diagnosis or prediction of Petitioner's ability to
8 remain alcohol-free in an uncontrolled environment. The Board
9 mentioned that Dr. Inaba's 2000 psychological evaluation of
10 Petitioner was fairly negative and that the risks and concerns she
11 raised in it were not adequately addressed in the 2006 report.

12 The Board also found that Petitioner's parole plans were
13 inadequate because he did not have viable residential options in
14 Los Angeles County, the county of his legal residence. The Board
15 noted that Petitioner had plans to stay with his brother in Oregon,
16 but did not think Petitioner could be released out of state and was
17 concerned that living with his brother would expose him to an
18 environment that included alcohol and guns. The Board also noted
19 that Petitioner had no employment plans and that his statement that
20 he would find a job when released was not adequate. The Board
21 suggested that, at his next hearing, Petitioner provide to the
22 Board copies of letters he sends out to potential employers with
23 the responses received and letters he writes to halfway houses for
24 living arrangements upon release.

25 The Board concluded that Petitioner had positive achievements
26 in that he had been discipline-free during the entire time of his
27 incarceration and he had completed vocational training courses, but
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1 that the positive achievements did not outweigh the factors of
2 unsuitability. In particular, the Board concluded that Petitioner
3 needed to participate in documented self-help programs to enable
4 him to face, discuss, understand and cope with stress in a non-
5 destructive manner and, until he did this, he would continue to be
6 unpredictable and a threat to others.

7 III. Superior Court Habeas Decision

8 On July 13, 2007, Petitioner filed, in superior court, a
9 petition for a writ of habeas corpus challenging the Board's
10 November 6, 2006 decision finding him unsuitable for parole. On
11 October 26, 2007, the superior court issued a written decision
12 denying Petitioner habeas relief. See Resp's Ex. 2, In re Dowell,
13 BH004727. The court noted that the Board had based its decision on
14 the following factors: (1) the circumstances of the commitment
15 offense; (2) Petitioner's criminal history; (3) Petitioner's
16 unstable social history; (4) Petitioner's insufficient
17 participation in self-help programs, and (5) Petitioner's lack of
18 viable parole plans. Id. at 1.

19 The court found that "some evidence" supported each of the
20 Board's reasons for determining unsuitability, and accepted the
21 Board's reasons as some evidence to support its finding that
22 Petitioner posed an unreasonable risk to the community if released.
23 The court found that the commitment offense was committed in an
24 especially cruel manner in that multiple victims were attacked,
25 injured or killed, the offense was carried out in a dispassionate
26 and calculated manner and the motive for the crime was trivial in
27 relation to the offense. The court found there was some evidence
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1 to support the Board's finding regarding Petitioner's criminal
2 history based on his previous convictions that were enumerated by
3 the Board and the fact that Petitioner was on probation for
4 pandering when he committed the commitment offense. The court
5 concluded that Petitioner's record showed escalation and that he
6 was undeterred by the earlier attempts to correct his criminality.
7 The court also found that Petitioner had abused his ex-wife during
8 the course of their relationship and this was some evidence to
9 support the Board's finding that Petitioner had a history of
10 unstable social relationships. Id. at 2-3.

11 The court also found the record contained some evidence to
12 support the Board's finding that Petitioner had not sufficiently
13 participated in any recent self-help programs. Finally, the court
14 found there was some evidence to support the Board's finding that
15 Petitioner lacked realistic parole plans because he did not have a
16 place to reside in the last county of his legal residence or an
17 offer of employment. Id. at 4. The court concluded that its
18 findings on all of the above factors constituted "some evidence" to
19 support the Board's determination that Petitioner presented an
20 unreasonable risk of danger to society and was therefore not
21 suitable for release on parole. Id.

22 Petitioner filed subsequent habeas petitions in the California
23 court of appeal and the California Supreme Court. Both petitions
24 were summarily denied. (Resp.'s Exs. 4, 6). Petitioner brought
25 this federal habeas corpus petition challenging the state court
26 decisions upholding the Board's determination.

LEGAL STANDARD

Because this case involves a federal habeas corpus challenge to a state parole eligibility decision, the applicable standard is contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir. 2002).

Under AEDPA, a district court may not grant habeas relief unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412 (2000). A federal court must presume the correctness of the state court's factual findings. 28 U.S.C. § 2254(e)(1).

Where, as here, the highest state court to reach the merits issued a summary opinion which does not explain the rationale of its decision, federal court review under § 2254(d) is of the last state court opinion to reach the merits. Bains v. Cambra, 204 F.3d 964, 970-71, 973-78 (9th Cir. 2000). In this case, the last state court opinion to address the merits of Petitioner's claim is that of the California superior court.

DISCUSSION

A prisoner has no constitutional or inherent right to be released before the expiration of a valid sentence. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979).

1 However, when a state statutory scheme creates a presumption that
2 parole release will be granted unless designated findings are made,
3 an inmate does have a constitutionally protected expectancy of
4 release on parole. Id. at 12; Board of Pardons v. Allen, 482 U.S.
5 369, 373 (1987); Hayward, 603 F.3d at 561. In California, the
6 parole statutes create certain procedural rights for prisoners.
7 Id. Moreover, the California Supreme Court, in In re Lawrence, 44
8 Cal. 4th 1181 (2008), and In re Shaputis, 44 Cal. 4th 1241 (2008),
9 established that, as a matter of state constitutional law, "some
10 evidence" of future dangerousness is necessary for the denial of
11 parole. Hayward, 603 F.3d at 562. Pursuant to the California
12 Supreme Court cases, the paramount consideration for the Board is
13 whether the inmate currently poses a threat to public safety. Id.

14 Thus, on federal habeas review, parole decisions in California
15 are analyzed under the "some evidence" standard set forth by the
16 California Supreme Court in Lawrence and Shaputis. Hayward, 603
17 F.3d at 562-63. Federal habeas courts must "decide whether the
18 California judicial decision approving the Board's decision
19 rejecting parole was an 'unreasonable application' of the
20 California 'some evidence' requirement, or was 'based on an
21 unreasonable determination of the facts in light of the evidence.'" Id.
22 Id. at 563.

23 In its supplemental brief, Respondent argues that Hayward
24 provides that a federal habeas court must determine only
25 (1) whether the prisoner received an opportunity to be heard and a
26 statement telling him why he was not paroled, and (2) whether
27 California's procedures were fundamentally sufficient to protect
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1 the prisoner's state substantive right. This argument is
2 foreclosed by post-Hayward Ninth Circuit cases. In Pearson v.
3 Muntz, 606 F.3d 606, 609 (9th Cir. 2010), the court noted that the
4 respondents, who had raised the same argument that Respondent does
5 here, had failed to recognize that state-created rights may give
6 rise to a liberty interest that may be enforced under federal law.
7 The court explained that Hayward's holding, that a federal habeas
8 court may review the reasonableness of the state court's
9 application of California's "some evidence" rule, meant that
10 compliance with that state requirement was mandated by the federal
11 Due Process Clause. Pearson, 606 F.3d at 609. Furthermore,
12 Pearson explained that "Hayward specifically commands federal
13 courts to examine the reasonableness of the state court's
14 application of the California 'some evidence' requirement, as well
15 as the reasonableness of the state court's determination of the
16 facts in light of the evidence. That command can only be read as
17 requiring an examination of how the state court applied the
18 requirement." Pearson, 606 F.3d at 609 (emphasis in original);
19 accord Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010).

20 Likewise, Petitioner's claim that the preponderance of the
21 evidence standard must be substituted for the "some evidence"
22 standard is foreclosed by Hayward, which explained that federal
23 habeas review is available only to decide whether the state court
24 decision rejecting parole was an unreasonable application of the
25 California "some evidence" requirement.

26 California law provides that a parole date is to be granted
27 unless it is determined "that the gravity of the current convicted
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1 offense or offenses, or the timing and gravity of current or past
2 convicted offense or offenses, is such that consideration of the
3 public safety requires a more lengthy period of incarceration
4 . . . " Cal. Penal Code § 3041(b).

5 The California Code of Regulations sets out the factors
6 showing suitability or unsuitability for parole that the parole
7 authority is required to consider. Cal. Code Regs. tit. 15,
8 § 2402(b). These include "[a]ll relevant, reliable information
9 available," such as:

10 the circumstances of the prisoner's social history; past
11 and present mental state; past criminal history,
12 including involvement in other criminal misconduct which
13 is reliably documented; the base and other commitment
14 offenses, including behavior before, during and after the
15 crime; past and present attitude toward the crime; any
16 conditions of treatment or control, including the use of
special conditions under which the prisoner may safely be
released to the community; and any other information
which bears on the prisoner's suitability for release.
Circumstances which taken alone may not firmly establish
unsuitability for parole may contribute to a pattern
which results in a finding of unsuitability.

17 Id.

18 Circumstances tending to show unsuitability for parole
19 include the nature of the commitment offense and whether "[t]he
20 prisoner committed the offense in an especially heinous, atrocious
21 or cruel manner." Id. § 2402(c). This includes consideration of
22 the number of victims, whether "[t]he offense was carried out in a
23 dispassionate and calculated manner," whether the victim was
24 "abused, defiled or mutilated during or after the offense,"
25 whether "[t]he offense was carried out in a manner which
26 demonstrates an exceptionally callous disregard for human
27 suffering," and whether "[t]he motive for the crime is

1 inexplicable or very trivial in relation to the offense." Id.

2 Other circumstances tending to show unsuitability for parole
3 are a previous record of violence, an unstable social history,
4 previous sadistic sexual offenses, a history of severe mental
5 health problems related to the offense, and serious misconduct in
6 prison or jail. Id.

7 Circumstances tending to support a finding of suitability for
8 parole include the lack of a juvenile record, a stable social
9 history, signs of remorse, that the crime was committed as a
10 result of significant stress in the prisoner's life, a lack of
11 criminal history, a reduced possibility of recidivism due to the
12 prisoner's present age, that the prisoner has made realistic plans
13 for release or has developed marketable skills that can be put to
14 use upon release, and that the prisoner's institutional activities
15 indicate an enhanced ability to function within the law upon
16 release. Id. § 2402(d).

17 The California Supreme Court, in Lawrence, explained the "some
18 evidence" standard as follows:

19 This standard is unquestionably deferential, but
20 certainly not toothless, and "due consideration" of the
21 specified factors requires more than rote recitation of
22 the relevant factors with no reasoning establishing a
rational nexus between those factors and the necessary
basis for the ultimate decision--the determination of
current dangerousness. . . .

23 Indeed, our conclusion that current dangerousness (rather
24 than the mere presence of a statutory unsuitability
25 factor) is the focus of the parole decision is rooted in
the governing statute. We have observed that "[t]he
26 Board's authority to make an exception [to the
27 requirement of setting a parole date] based on the
gravity of a life term inmate's current or past offenses
should not operate so as to swallow the rule that parole
is 'normally' to be granted. . . ."

1 Consistent with this statutory regime, the Board's
2 regulations, establishing a matrix of factors for
3 determining the suggested base terms for life prisoners,
4 contemplates that even those who committed aggravated
murder may be paroled after serving a sufficiently long
term if the Board determines that evidence of
postconviction rehabilitation indicates they no longer
pose a threat to public safety. . . .

5 In re Lawrence, 44 Cal. 4th at 1210-11.

6 The Court finds that the record contains "some evidence" of a
7 nexus between the findings of the state court and its determination
8 that Petitioner would be a danger to society if released.

9 The findings of the Board and the state court that the
10 commitment offense was carried out in an especially cruel manner
11 constitutes "some evidence" of Petitioner's current dangerousness.
12 The offense was especially cruel because it involved multiple
13 victims and it was an execution-like killing, carried out after the
14 victim had surrendered. Petitioner contends there were not
15 multiple victims because he did not force his ex-wife into his car;
16 rather, she came with him voluntarily. At the hearing before the
17 Board, the following facts regarding the commitment offense, taken
18 from the Probation Officer's Report, were read into the record:

19 At about 12:30 in the morning on March 24, 1982, the
20 defendant entered the residence of victim Pauline Dowell,
21 ex-common-law wife, forced her to dress and stated that
22 he was going to kill her and her boyfriend, victim James
Winnet. Defendant then forced her into his red pickup
and they drove looking for victim Winnet. At the time,
23 victim Dowell did not know that there--they were being
followed by victim Winnet. The Defendant stopped the
24 pickup truck and retrieved a handgun from beneath the
seat and exited the truck. Several shots were fired, and
the Defendant told victim Winnet that he was going to
25 kill him. At about 1:40 a.m., victim Winnet was
determined to be dead. After Defendant shot victim
26 Winnet, victim Dowell ran from the scene to call for
help. The Defendant shouted for her to stop, and when
27 she did not comply, he fired one shot at her.

1 Petitioner was asked:

2 Sir, is that an accurate description of what--I know it's
3 a brief description, but is that an accurate description
of what happened on that night?

4 He responded:

5 Yeah, that's the record of the court. I dispute one item
6 in there. I never shot at Pauline. But other than that,
it's fairly accurate, yes.

7 Transcript of November 30, 2006 Hearing (TR) at 10-11.

8 Thus, Petitioner's current statement that his ex-wife came
9 with him voluntarily is not credible.

10 However, Petitioner's current dangerousness is not supported
11 by the findings of the Board and the superior court that he engaged
12 in an "escalating pattern of criminal conduct." Petitioner's
13 convictions were episodic and were for minor, non-violent offenses
14 such as public drunkenness, failure to pay child support and
15 driving under the influence (DUI). He was placed on probation for
16 the first two offenses and served eight days in jail for the DUI.
17 Regarding the convictions for possession of narcotics and a
18 concealed weapon, Petitioner explained at the hearing that the
19 narcotics were prescription medications that did not belong to him.
20 They were in the pocket of a friend's coat that he was wearing, and
21 the concealed weapon was a hunting knife he had in his belt because
22 he and his friends had just come home from a camping trip. Id. at
23 20. Petitioner may have minimized the facts of this crime, but his
24 sentence was only one year probation. Likewise, Petitioner's
25 sentence for pandering was three years probation.

26 This record cannot be described as escalating criminal
27 conduct. However, the fact that Petitioner had been placed on
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1 probation several times and, most significantly, was on probation
2 at the time of the commitment offense, supports the court's finding
3 that he did not learn from attempts to correct his criminality.
4 This factor constitutes "some evidence" that Petitioner would be a
5 danger to society if released on parole.

6 Petitioner argues that the Board's consideration of his past
7 criminal record was improper because Title 15 California Code of
8 Regulations §§ 2322 and 2326 prohibit the Board from considering
9 past crimes that are over five years old. However, these
10 regulations apply to prisoners sentenced under the indeterminate
11 sentence law prior to November 8, 1978. Petitioner was sentenced
12 in 1983. Furthermore, Title 15 California Code of Regulations
13 § 2315 indicates that the Board considers the factors in §§ 2318-
14 2328 to determine the period of confinement once a prisoner is
15 found suitable for parole. The Board did not find Petitioner
16 suitable for parole; therefore, §§ 2322 and 2326 would not have
17 been applicable even if Petitioner had been sentenced prior to
18 1978. Title 15 California Code of Regulations §§ 2400 et seq.
19 apply to prisoners who committed murders on or after November 8,
20 1978, such as Petitioner. Under Title 15 California Code of
21 Regulations § 2402(b), the Board may consider involvement in other
22 criminal activity that is reliably documented. Petitioner argues
23 his past crimes are not reliably documented. However, the
24 probation report's summary of Petitioner's criminal history,
25 including his arrests and convictions, is reliable documentation.
26 The Board summarized this history at the hearing and asked
27 Petitioner if there was anything that should be added or deleted
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1 and Petitioner answered, "Not that I'm aware of." TR at 30.

2 The court's finding that Petitioner had a history of unstable
3 social relationships is not supported by the evidence. This
4 finding was based upon the fact that Petitioner once pushed or hit
5 his wife, who then called the police. However, Petitioner
6 explained to the Board that this was the only time he was violent
7 toward his wife and, at that time, he was upset because she was
8 being unfaithful to him. This isolated instance is insufficient to
9 support the finding that Petitioner has a "history of unstable
10 social relationships."

11 The Board expressed three concerns about Petitioner's parole
12 plan to live with his brother in Oregon: (1) Petitioner's brother's
13 home environment included guns and alcohol; (2) Petitioner could
14 not be paroled out-of-state; and (3) Petitioner did not have an
15 offer of employment upon release from prison. The record was
16 devoid of any evidence of guns and alcohol at the residence of
17 Petitioner's brother. To the contrary, Petitioner's counsel argued
18 that Petitioner's brother would provide an appropriate environment
19 because he belonged to the LDS church, which abjures alcohol. TR
20 at 81. As indicated above, while in prison, Petitioner attended
21 LDS services and intended to continue attending them after his
22 release.

23 The Board did not indicate why Petitioner could not be paroled
24 out-of-state. California Penal Code § 11177(1)(a) provides that
25 certain states have agreed to permit parolees to reside in any
26 other state that is a party to the agreement if that person is a
27 resident of or has family residing in the receiving state and can

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1 obtain employment there. Although Petitioner has family in Oregon,
2 he did not have a job offer nor did he submit evidence that he
3 could obtain employment there. Thus, the Board was correct in
4 discounting Petitioner's parole plan for Oregon. Turning to the
5 alternative of paroling in California, the Board found that
6 Petitioner did not submit evidence of efforts to find housing at a
7 half-way house or other suitable living arrangements in California.
8 Petitioner's lack of supportive living arrangements would make his
9 transition into society difficult. Therefore, the findings of the
10 Board and state court that Petitioner's insufficient plans for
11 living arrangements was "some evidence" of current dangerousness
12 was not unreasonable.

13 As noted above, the Board was correct that Petitioner did not
14 have an offer of a job upon his release, either in Oregon or
15 California, and did not mention any efforts to seek employment.
16 Petitioner points out that Title 15 California Code of Regulations
17 § 2402(d)(8) requires a prisoner to make realistic plans for
18 release or develop marketable skills. Petitioner argues that,
19 because he has marketable skills, he is not required to have
20 realistic parole plans. Petitioner is wrong. Both are important
21 factors in predicting a prisoner's successful transition to a law-
22 abiding life after release from prison. Although Petitioner
23 received a certificate in the maintenance and operation of high
24 pressure boilers, there is no evidence that he could obtain
25 employment in the community on the basis of this certificate. The
26 Board found that Petitioner's lack of realistic employment plans
27 would make his transition into society very difficult. Petitioner
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1 is less likely to be able to support a crime-free lifestyle if he
2 does not have employment. Therefore, the findings of the Board and
3 the state court that Petitioner's lack of an offer for a job was
4 "some evidence" of his current dangerousness was not unreasonable.

5 The Board relied heavily upon the fact that Petitioner had not
6 sufficiently participated in self-help programs as "some evidence"
7 of his current dangerousness, and the state court affirmed this
8 finding. After 1996, Petitioner only went to self-help group
9 meetings through the LDS church, and failed to provide
10 documentation of his attendance at this program. TR at 43-46.
11 Citing Title 15 California Code of Regulations § 2402(c)(5),
12 Petitioner argues that he does not need self-help programs because
13 he does not have a lengthy history of severe mental problems.
14 Although § 2402(c)(5) lists severe mental problems as a factor
15 tending to show unsuitability for parole, it is not necessary that
16 an inmate have mental problems to benefit from participating in
17 self-help groups. Self-help groups can help participants achieve
18 understanding and remorse, which are factors indicating suitability
19 for parole. See Cal. Code Regs. tit.15, § 2402(d). Furthermore,
20 participation in institutional activities would indicate an
21 enhanced ability to act within the law. For these reasons, the
22 findings of the Board and the state court that Petitioner's lack of
23 participation in self-help programs was some evidence of current
24 dangerousness was not unreasonable.

25 Petitioner objects to the Board's reliance on Dr. Inaba's 2000
26 psychological evaluation. However, the state court did not include
27 this as support for the Board's finding of current dangerousness.

1 Finally, Petitioner argues that the Board unreasonably relied
2 on the immutable facts of his commitment offense and his previous
3 criminal record to find he was unsuitable for parole. In the
4 Hayward en banc decision, the Ninth Circuit quoted Lawrence to the
5 effect that continued reliance on a prisoner's aggravated offense,
6 without more, does not establish current dangerousness. Hayward,
7 603 F.3d at 562 (citing Lawrence, 44 Cal. 4th at 1213-14).
8 However, as discussed above, in Petitioner's case, the Board and
9 the superior court relied on more than just the circumstances of
10 the commitment offense and Petitioner's criminal record to conclude
11 that he would be a danger if released. Therefore, this argument is
12 unpersuasive.

13 In sum, the findings of the Board and state court that the
14 commitment offense was committed in an especially cruel,
15 dispassionate and calculated manner, that Petitioner had not
16 benefitted from attempts to correct his criminality, that
17 Petitioner lacked a suitable living arrangement and offer of
18 employment upon release and that he had not sufficiently
19 participated in self-help programs provide "some evidence" that
20 Petitioner would be a danger to the public, if released on parole.
21 Thus, the state court's denial of Petitioner's claims for habeas
22 relief was not contrary to or an unreasonable application of
23 Supreme Court authority or an unreasonable finding of facts based
24 on the evidence in the record.

25 CONCLUSION

26 For the foregoing reasons, the petition for a writ of habeas
27 corpus is DENIED. The Court issues a certificate of appealability
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1 for this petition. See Rule 11(a) of the Rules Governing § 2254
2 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on
3 certificate of appealability in same order that denies petition).
4 A certificate of appealability should be granted "only if the
5 applicant has made a substantial showing of the denial of a
6 constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of
7 appealability must indicate which issue or issues satisfy the
8 showing required by § 2253(c)(2). 28 U.S.C. § 2253(c)(3). The
9 Court finds that Petitioner has made a sufficient showing of the
10 denial of a constitutional right on the single issue raised in his
11 petition. The Clerk of the Court shall enter judgment and close
12 the file.

13 IT IS SO ORDERED.

14
15 Dated: 11/3/2010



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

KENNETH DOWELL,

Plaintiff,

v.

BOARD OF PRISON HEARINGS et al,

Defendant.

Case Number: CV08-01683 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 3, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kenneth Dowell C-78669
Avenal State Prison
P.O. Box 900
130-11Low
Avenal, CA 93204

Dated: November 3, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California